



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

1183478 - R8 SDMS

NOV 19 2010

OFFICE OF
GENERAL COUNSEL

Ms. Julie Rosen
Kaplan, Kirsch & Rockwell, LLP
1675 Broadway, Suite 2300
Denver, CO 80202

Re: Freedom of Information Act Appeal 08-FOI-00117-10-A (HQ-APP-00115-10)

Dear Ms. Rosen:

I am responding to your April 28, 2010, Freedom of Information Act ("FOIA") appeal. You appealed the March 30, 2010 decision of Eddie A. Sierra, the U.S. Environmental Protection Agency ("EPA" or "Agency") Region 8 Acting Assistant Regional Administrator of the Office of Ecosystems Protections and Remediation, to deny in part the request you submitted to EPA on January 20, 2010. In your initial FOIA request, you sought the following information:

"All records [that] pertain to the Silver Creek Tailings site and are listed by Document ID. There are five documents requested which are labeled as non-releasable . . . Accordingly, I respectfully request the production of such records, in full or redacted form, or an explanation as to any agency determination to withhold requested documents, in full or in part, pursuant to 40 C.F.R. 2.104."

The March 30, 2010, decision stated that your request was denied in part because the documents were exempt from disclosure under Exemptions 5 and 7(C) of the FOIA. 5 U.S.C. §§ 552(b)(5) and (7)(C). The decision withheld the following three documents: (1) Cover Memorandum and Data from Annette Sackmann, EPA contractor, to Paula Schmittiel, EPA, 18 pages (October 26, 1987), Doc ID: 9870101; (2) Cover letter and Report from [Eric L. Edelstein], EPA contractor, to EPA (April 25, 1986), Doc ID: 867783; and (3) duplication of document (2). Although not identified in the initial denial letter, another five documents were withheld. Moreover, subsequent to the March 30 letter, Region 8's Record Center explained to you that it was unable to locate another ten documents identified in your initial FOIA request.

In your April 28, 2010, appeal, you expressed that the documents were withheld improperly because the FOIA exemptions 5 and 7(C) were inapplicable, release of the documents would not harm interests protected by the FOIA exemptions, and the inconsistency with EPA's past standard practice to release some PRP reports and related records.

I have carefully considered your request, EPA's decision, and your appeal. For the reasons set forth below, I have determined your appeal should be, and is, granted in part and denied in part. I have determined the "Brief History of Prospector Square" (Document ID 966435) may be released with redactions. Your appeal is therefore granted with regard this document. The remainder of the responsive

documents will continue to be withheld.¹ I have also determined that your appeal to verify EPA's search for ten records, listed below, is moot because Region 8 released the documents to you in a letter dated June 15, 2010.

Exemption 5

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorand[a] or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The documents that were withheld under Exemption 5 of the FOIA are exempt from disclosure because they are intra-agency memoranda or letters generated by EPA employees and EPA contractor and because the documents contain information that is protected by the attorney work product privilege, the attorney-client privilege, and the deliberative process privilege. The contractor documents are intra-agency records because the contractor was acting as EPA's consultant and had no independent interest in the matter.

Attorney Work Product Privilege

Exemption 5 of the FOIA protects from disclosure a record, or a portion of a record, that is subject to the attorney work product privilege. The attorney work product privilege protects documents prepared by, or at the direction of, an attorney in anticipation of litigation or during litigation. The following withheld documents below were prepared by or at the direction of an attorney in anticipation of litigation.

Document ID	Title	Withheld Under FOIA Exemption(s)
951235	CERCLA cost recovery closeout memorandum, Silver Creek Tailings, Park City, UT (09-23-1997)	FOIA Exemptions 5, 7(A), and 7(C)
966438	Preliminary Analysis of Potential U.S. Government Liability Related to Conditions and Events at Park City, and Proposed Strategy to Improve Enforcement via Lender Liability (04-24-1994)	FOIA Exemption 5 and 7(A)
967783	Silver Creek Tailings Park City, Utah: Responsible Party Search, Final Summary Report (04-01-1986)	FOIA Exemptions 5 and 7(C)

Release of the withheld records would allow scrutiny of EPA's sensitive litigation preparations. Therefore, I have determined that the withheld documents are exempt from disclosure under the attorney work product privilege of Exemption 5 of the FOIA.

Attorney-Client Privilege

Exemption 5 of the FOIA also protects from disclosure a record, or portion of a record, that is subject to the attorney-client privilege. The attorney-client privilege protects confidential communications between an attorney and his/her client relating to a legal matter for which the client has sought professional advice. The privilege applies to facts divulged by a client to the

¹ Three documents may also be confidential business information and exempted from disclosure under Exemption 4 of the FOIA. 5 U.S.C. § 552(b)(4). The three documents include: 970101, 3002342, and 3002343. EPA determined that a confidential business information determination was not necessary at this time because FOIA Exemptions 5, 7(A), and 7(C) could be asserted to withhold these documents from public disclosure.

attorney, to opinions given by the attorney to the client based upon those facts, and to communications between attorneys which reflect client-supplied information. The withheld documents below are protected by the attorney-client privilege because they constitute communications between the attorneys and the client that relate to a legal matter for which the client sought professional advice.

Document ID	Title	Withheld Under FOIA Exemption(s)
966438	Preliminary Analysis of Potential U.S. Government Liability Related to Conditions and Events at Park City, and Proposed Strategy to Improve Enforcement via Lender Liability (04-24-1994)	FOIA Exemption 5
970101	Folder contains: Confidential Corres. PRP Search Final Summary Report (01-01-1986)	FOIA Exemptions 5, 7(A) and 7(C)

Release of the withheld records would allow scrutiny of sensitive, confidential communication between attorneys and the client. Therefore, I have determined that the withheld material is exempt from disclosure under the attorney-client privilege of Exemption 5 of the FOIA.

Deliberative Process Privilege

Exemption 5 of the FOIA also protects from disclosure a record, or portion of a record, that is subject to the deliberative process privilege. The deliberative process privilege protects documents that are both predecisional and deliberative. The withheld documents below are protected by the deliberative process privilege because they reflect internal discussions, advice, and recommendations that were considered during EPA's decision-making process.

Document ID	Title	Withheld Under FOIA Exemption(s)
966435	"Brief History of Prospector Square" (Located in the NE ½ Section 9, T25, R4E of the Park City East of the Intersection of Highway 224 on Alt. 40 in Summit County (01-01-1111)	FOIA Exemptions 5 and 7(C)
966443	CC: Mail Re: The Silver Creek Drainage Situation (10-13-1994)	FOIA Exemption 5
967783	Silver Creek Tailings Park City, Utah: Responsible Party Search, Final Summary Report (04-01-1986)	FOIA Exemptions 5 and 7(A)

Release of the withheld records would prematurely disclose proposed policies before they are finally adopted and cause public confusion by disclosing reasons and rationales that were not, in fact, ultimately grounds for EPA's actions. Therefore, I have determined that the withheld material is exempt from disclosure under the deliberative process privilege of Exemption 5 of the FOIA.

Exemption 7(A)

Exemption 7(A) of the FOIA protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The withheld documents below are records compiled for law enforcement purposes.

Document ID	Title	Withheld Under FOIA Exemption(s)
951235	CERCLA cost recovery closeout memorandum, Silver Creek Tailings, Park City, UT (09-23-1997)	FOIA Exemptions 5, 7(A), and 7(C)
966438	Preliminary Analysis of Potential U.S. Government Liability Related to Conditions and Events at Park City, and Proposed Strategy to Improve Enforcement via Lender Liability (04-24-1994)	FOIA Exemption 5 and 7(A)
966443	CC: Mail Re: The Silver Creek Drainage Situation (10-13-1994)	FOIA Exemption 5
970101	Folder contains: Confidential Corres. PRP Search Final Summary Report (01-01-1986)	FOIA Exemptions 5, 7(A) and 7(C)
3002342	Utah, Silver Creek Tailings, Report of Surface Water Sampling Activities (First Round of Sampling) TDD F08-8611-34C (08-17-1987)	FOIA Exemption 7(A)
3002343	Utah, Silver Creek Tailings, Report of Surface Water Sampling Activities (First Round of Sampling) TDD F08-8611-34C (08-14-1987)	FOIA Exemption 7(A)

The documents were compiled by EPA for the purpose of enforcing the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). 40 U.S.C. §§ 9601 *et seq.* Further, the production of these materials could reasonably be expected to interfere with ongoing enforcement proceedings because it would hinder the government's ability to control or shape the investigation and prematurely reveal the government's evidence or strategy. Therefore, I have determined that the withheld material is exempt from disclosure under Exemption 7(A) of the FOIA.

Exemption 7(C)

Exemption 7(C) of the FOIA exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." The withheld document below was compiled for law enforcement purposes. The record was compiled by EPA for the purposes of enforcing CERCLA. 40 U.S.C. §§ 9601 *et seq.*

Document ID	Title	Withheld Under FOIA Exemption(s)
951235	CERCLA cost recovery closeout memorandum, Silver Creek Tailings, Park City, UT (09-23-1997)	FOIA Exemptions 5, 7(A), and 7(C)
966435	"Brief History of Prospector Square" (Located in the NE ½ Section 9, T25, R4E of the Park City East of the Intersection of Highway 224 on Alt. 40 in Summit County (01-01-1111)	FOIA Exemptions 5 and 7(C)
970101	Folder contains: Confidential Corres. PRP Search Final Summary Report (01-01-1986)	FOIA Exemptions 5, 7(A) and 7(C)

The documents contain information relating to witnesses and identities of law enforcement personnel. The production of this information could reasonably be expected to constitute an unwarranted invasion of the personal privacy of these individuals because it would lead to personal embarrassment or discomfort or create the potential for harassment. Therefore, I have determined that the withheld material is exempt from disclosure under Exemption 7(C) of the FOIA.

Reasonably Segregable Information

I have determined that there is no reasonably segregable nonexempt information in the withheld documents. The disclosure of any factual information contained in the withheld documents would reflect EPA's internal deliberations, attorney work products, attorney-client communications, and records compiled for law enforcement purposes since that information is inextricably intertwined with the exempt material. For this reason, these documents are being withheld in their entirety.

Locating Additional Records

I have determined that your appeal to verify EPA's search for ten records, listed below, is moot because Region 8 released the documents to you in a letter dated June 15, 2010.

Document ID	Title
970004	"Drilling Activities Report for Prospector Square, Park City, Utah" Folder Contains: File Opening Procedures FOIA (01-01-1111)
970075	Folder Contains: Site Inspection Report for Prospector Square Analytical Results Report for Prospector Square Appendix B, Air Sampling ARR for Prospective Square (01/01/1984)
970083	Folder Contains: Correspondence Workplan Agenda Park City Municipal Corporation Contact List Handwritten Notes Data Map& Charts (01/01/1987)
970084	Folder Contains: Site Inspection Report Correspondence Records of Communication Site Investigation Agreement for Expanded Site Investigation Public Meeting Agendas & Handwritten Notes Response to Review Comments on the Draft Prospector Square Air Sampling (01-01-1984)
970087	Folder Contains: Review of EPA Hazard Ranking System Scoring, Proposed Inclusion of Silver Creek Tailings Site (Prospector Square) Park City, Utah on National Priority List Prospector Square Air Sampling Program (01/01/1985)
970088	Folder Contains: Toxic Element Concentrations at Prospector Square Development Preliminary Assessment Report, Summit County Tailings Results of Pump Test of Pacific Bridge & Park Meadows Wells List Of and Original Documents That EPA had in Their Possession (01-01-1983)
970090	Folder Contains: Silver Creek Tailings Responsible Party Search Silver Creek Tailings Site Fact Sheet Prospector Improvement District Assessment Roll Prepared 10-17-1985 (01-01-1985)
970091	Folder Contains: Correspondence Results of Pump Test of Pacific Bridge & Park Meadows Wells Aquifer Test Design Interview with Hugh Kaufman 11/14/85 Silver Creek Meeting Notes Comments Trip Report from 8/21-22/85 Report Titled Water (01-01-1983)
970092	Folder Contains: Groundwater & Surface Water Study Report Air Investigation Work Plan for Prospector Square (01-01-1987)
970093	Folder Contains: Interim Analytical Results Report, First Round Ground Water and Tailings Sampling, Silver Creek Tailings Prospector Square Analytical Results Report for Ambient Air & Residential Characterization at Prospector Square, Park City, Utah (01-01-1987)

This letter constitutes EPA's final determination on your appeal. In accordance with 5 U.S.C. § 552(a)(4)(B), you have the right to seek judicial review of this determination by instituting an action in the district court of the United States in the district in which you reside, or have your

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principle place of business, or in which the Agency records are situated, or in the District of Columbia. As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Please call Quoc Nguyen at (202) 564-6343 if you have any questions concerning this matter.

Sincerely,



Kevin Miller
Assistant General Counsel
General Law Office

cc: Larry Gottesman, HQ Freedom of Information Office
Mia Bearley, Region 8, Enforcement Attorney
Sara Laumann, Region 8, Associate Regional Counsel
Kathryn Hernandez, Region 8, Superfund Remedial Officer

Brief History of Prospector Square

Prospector Square is located in the NE 1/4 section 9, T25, R4E of the Park City East Quadrangle and is approximately 1/2 mile east of the intersection of highway 224 on Alt 40. Park City is located in Summit County and is approximately 30 miles east of Salt Lake City.

Mill tailings were first deposited on Prospector Square in the early 1900's by several mining companies (mostly silver). It was thought that some of the tailings were slurried to Prospector Square by use of Silver Creek. Mill tailings were deposited on-site until the 1930's. The tailings cover approximately 80 acres and range in depth from 1 to 10 feet. The Silver Creek Site consists of an estimated 700,000 tons of tailings.

In the early 1940's Pacific Bridge reworked the tailings. Solvents and acids were used to leach out silver. Pacific Bridge used an in situ treatment so the tailings never left Prospector Square. Exact details on Pacific Bridges operation cannot be found, they have long since been out of business.

In the late 70's and early 80's commercial developers started building homes and businesses on Prospector Square. The tailings were not properly covered and are still exposed in undeveloped areas of Prospector Square. A population of approximately 10,000 persons live or have businesses on this site (300 persons on the tailings).

The Utah State Department of Health (USDH) first became aware of a potential problem on Prospector Square when the Utah Geological and Mineral Survey (UGMS) was asked by Park City to do a special geological study in 1984. The study was designed to look at the engineering geology of Park City for future development. During the study the UGMS took boreholes soil samples on Prospector Square. The analytical results of the soil samples showed concentrations of lead at 4000 ppm, cadmium at 89 ppm, arsenic at 400 ppm and silver at 70 ppm. EPA's EP tox limit for lead is 5 ppm and cadmium is 1 ppm.

After receiving UGMS's results, the USDH collected water samples off Silver Creek which showed higher concentrations of lead below Prospector Square when compared with the samples taken above Prospector Square. The upstream sample yielded lead at 5 ppb, cadmium at 5 ppb, arsenic at 2 ppb and the downstream yielded 112 ppb for lead, 8 ppb for cadmium and 6ppb for arsenic. The MCL for lead was 50 ppb (SDWA).

In April 1984, the USDH along with Summit County Health Department and the Rocky Mountain Center of Occupational and Environmental Health conducted a health effect study. Blood samples were taken from 39 children. The highest child's blood

lead level found was 28 mg/deciliter, and the average was 9 mg/deciliter. Lead determinations found that the average blood lead concentration for the potentially exposed group was 9.5 micrograms per 100 cc of blood, while the comparison group averaged 7.5 micrograms per 100 cc. In October 1984, blood samples were again collected from the potentially exposed group (the average blood lead was 10.5 micrograms per 100 cc) and a comparison group of children (the mean blood lead was 9.5 micrograms per 100 cc). This slight increase between the pre-summer and post-summer blood lead levels in these children were not statistically significant. There were three children that exceeded the Centers for Disease Control guidelines of 25 micrograms per 100 cc of blood lead. There was a general lack of significant increase in the average blood lead concentrations of Prospector Square children when compared to children who did not live in this community.

Dust samples were taken during the site inspection conducted in June 1984. Three homes were sampled and the analytical results of one home showed concentrations of lead at 4072 ug/g, silver at 28 ug/g and cadmium at 42 ug/g.

With the additional information, the site was rescored for NPL consideration.

Exemption 7(A)

Exemption 7(A)

ATSDR report

The Agency for Toxic Substances and Disease Registry (ATSDR) completed a report dated October 2, 1986. The Silver Creek Tailings contain elevated levels of heavy metals. They are uncontained, accessible to the inhabitants of Prospector Square, and a potential source of contamination to ground and surface water in the Park City area. Limited environmental sampling has shown elevated levels of lead, cadmium, and other heavy metals in various media. The Silver Creek Site represents a potential health threat to area residents. The survey of children in the Prospector Square community did not indicate that their blood lead levels were generally elevated when compared to children who lived away from the site.

Exemption 5

Exemption 7(C)

] Exemption
7(c)

Changes in Blood Lead Levels

The blood lead level was 25 micrograms Pb/deciliter blood (approximately two fluid ounces) in 1988 and changed to 10 micrograms/deciliter in 1990 due to increased understanding brought about by epidemiologic studies (definition: a branch of medical science that deals with the incidence, distribution, and control of disease in a population. the sum of the factors controlling the presence or absence of a disease or pathogen).

The integrated life-time average is the concern. Lead bioaccumulates in bone, but the bone is not the target organ. The target organ is the nervous system.

Silver Maple/Richardson Flats

Based on the review of Preliminary Assessment/Site Investigation information provided to EPA through September 9, 1994, EPA has made a determination to require no further CERCLA action on the Silver Maple Claims Site.

Richardson Flats was proposed in 1980s and removed by EPA because EPA did not have adequate data to respond to a comment from Park City Mines (a PRP) regarding the air exposure pathway and associated air monitoring. EPA has repropoed the site due to State influence in 1990.

Screening levels for Lead

See OSWER Directive #9355.4-12, dated July 14, 1994. Range of 400-5000 ppm, limited interim controls are recommended depending on conditions at the site, while above 5000 ppm, soil abatement is recommended.

For Mining sites, must consider the bioavailability. Typically, tailings from mines are not very soluble and are not as bioavailable as other lead sources which are easily dissolved (e.g., lead-battery waste).

Other sources for lead exposure: reloading ammunition, leaded glass/stain glass; electronics/lead soldering; pottery (mexican/italian)

] Exemption
5



FOIA Appeal Response 08-FOI-00117-10-A (HQ-APP-00115-10) attached

Quoc Nguyen to: Larry Gottesman, Mia Bearley, Sara Laumann,
Kathryn Hernandez

11/19/2010 11:47 AM

Cc: Kevin Miller, Maureen O'Reilly

Good afternoon,

Attached is the response to FOIA Appeal 08-FOI-00117-10-A (HQ-APP-00115-10). Please email me if you have any questions on this matter.

Sincerely,
Quoc



08-FOI-00117-10-A (HQ-APP-00115-10) (Rosen - 5, 7A, 7C).pdf

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